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FILED
FEB 12 2008
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SUPREME COURT, U.S.

(3)

No. 07-722

In the Supreme Court of the United States

AHMAD B. NURRIDDIN,
Petitioner,

v.

MICHAEL GRIFFIN, ADMINISTRATOR,
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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February 12, 2008

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REPLY TO BRIEF IN OPPOSITION

Properly understood, the government's brief fails to rebut Petitioner's arguments in favor of review. First, the government disregards the clear and undisputed split between the circuits over the meaning of this Court's decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). Second, it incorrectly concludes that the instant case is "fact-bound" by misreading the word "discrete" as synonymous with "unrelated." Finally, it unfairly dismisses the impact this legal conflict has on the even-handed administration of federal civil rights laws. For the reasons set forth below, this Court should grant the petition, resolve the conflict present in the lower courts, and restore the proper interpretation of Title VII's exhaustion requirements.

1. The government disregards a clear circuit split by claiming that "no appellate authority purports to dispense with the exhaustion requirements for discrete, independently actionable conduct [that occurs] after an act identified in a prior charge." Br. in Opp. 9–10. This assertion is flatly wrong.

Since *Morgan*, the courts of appeals have acknowledged that a split exists as to whether *Morgan*'s exhaustion rule applies to acts of discrimination that occur *after* a charge is filed and are related to the charged conduct. Pet. 13–16. Even the EEOC—the federal agency charged with interpreting and administering Title VII—has

agreed that the circuits are in conflict on this very point. *See* Pet. 15–16, 27; EEOC COMPLIANCE MANUAL § 2-IV, at n.186 ("The Commission disagrees with [*Martinez v. Potter*]. . . . *Morgan* does not affect existing case law that permits subsequent related acts to be addressed in an ongoing proceeding.") (citing *Delisle v. Brimfield Twp. Police*, 94 Fed. App'x 247 (6th Cir. 2004)). In its opposition brief, the government does not once cite or explain the EEOC's guidance on this point—a telling omission.

Furthermore, the government's denial of the circuit split contradicts the plain holdings of the relevant cases. In *Wedow v. City of Kansas City*, the Eighth Circuit expressly rejected the argument that "the [*Morgan*] rule applies with equal force to discrete acts of discrimination that occur subsequent to a timely filed EEOC charge," concluding that "related subsequent acts may be considered exhausted." 442 F.3d 661, 673 (8th Cir. 2006). Similarly, in *Lyons v. England*, the Ninth Circuit held that exhaustion of a discrete post-filing claim of non-promotion was not required because it was sufficiently related to an exhausted claim of non-promotion, 307 F.3d 1092, 1104–1105 (9th Cir. 2002)—even though *Morgan* states that "failure to promote" is a "[d]iscrete" act, 536 U.S. at 114. And in *Delisle v. Brimfield Township Police*, the Sixth Circuit did not require separate exhaustion of a post-filing retaliatory demotion claim because it was "reasonably related" to exhausted conduct, even though the subsequent claim was independently actionable. 94 Fed. App'x at 254. Each of these

courts reached the precise conclusion that the government claims has never been held—discrete, independently actionable conduct occurring after an EEOC charge need not be separately exhausted if it is related to conduct raised in the prior charge.

These authorities are directly at odds with *Martinez v. Potter*, 347 F.3d 1208 (10th Cir. 2003), which the government contends is the controlling law in this case. Br. in Opp. 7, 10 (stating "[t]he court of appeals' unpublished decision was correct" and *Martinez* is "consistent with the holding below"). In *Martinez*, the Tenth Circuit held that *Morgan* requires separate exhaustion of "discrete claims based on incidents occurring after the filing of [a p]laintiff's EEOC complaint," regardless of whether or not they are related to claims raised in the filed charge. 347 F.3d at 1211–1212. *Martinez* thus stands in irreconcilable conflict with *Wedow*'s contrary holding.

These authorities demonstrate that there is a very real split in the circuits over the meaning and reach of *Morgan*, which only this Court can resolve.

2. The government attempts to downplay the relevance of this circuit split by recharacterizing the issue in this case as "fact bound." Br. in Opp. 7. To do so, however, it takes three tortuous logical steps. First, it contends that the cases cited by Nurriddin—*Wedow*, for example—only apply to "certain narrow categories of subsequent discriminatory conduct that are *closely related* to a prior charge." Br. in Opp. 10 (emphasis added). Next, it

argues that Nurriddin's claims are not "*closely related*" to the claims that he filed with the EEO—rather, they are "discrete." Br. in Opp. 9, 12–13. Finally, it seizes on the district court's statement that Nurriddin's claims are "claims of *discrete* discrimination or retaliation" and argues that this "fact-bound characterization" makes this case unworthy of this Court's review. Br. in Opp. 12 (emphasis added).

The government's argument, however, relies on a definition of the word "discrete" that is contradicted by this Court's Title VII jurisprudence. In *Morgan*, this Court used "discrete" as a term-of-art, referring to independently actionable claims of discriminatory or retaliatory employment practices. 536 U.S. at 114. Thus, "discrete" does not mean "unrelated" as the government contends—a claim can be legally "discrete" and still be related to another claim. Indeed, the *Morgan* Court acknowledged that "discrete" acts could share a "connection" with other acts, *id.* at 111, and that circuit courts had relied upon such connections to forgive the failure to exhaust related acts separately, *id.* at 104. Though the Court rejected such an exhaustion rule with respect to related claims that occurred well *before* the filing of an EEOC charge, it did not address whether "discrete" claims could be sufficiently related for exhaustion purposes in other circumstances.

In this case, Nurriddin's claims of post-charge discriminatory and retaliatory non-promotion were based on circumstances identical to those alleged to

the EEO. Pet. 30–32. Nurriddin argued below that his post-charge claims of discriminatory and retaliatory non-promotion, even if independently actionable and therefore "discrete" under *Morgan*, were nevertheless *related to* the discrete non-promotion claims raised in his 1995 EEOC charge, and therefore should be deemed properly exhausted. Pet. App. 22. Nothing in *Morgan* requires that a discrete act of discrimination be "unrelated" to any other act of discrimination. The district court's use of the word "discrete," therefore, does nothing to remove this case from the heart of the existing circuit split.

Courts that have delved into the current split seem to have rejected the government's arguments. First, they have uniformly viewed their conflicting decisions as opposing answers to a legal question—not a fact-bound dispute. *See, e.g.*, *Wedow*, 442 F.3d at 673–674 (noting conflict between *Martinez* and *Delisle*); *Weber v. Battista*, 494 F.3d 179, 184 (D.C. Cir. 2007) (noting conflict between *Wedow* and *Martinez*); *Jones v. Univ. of D.C.*, 505 F. Supp. 2d 78, 84 (D.D.C. 2007) (same). Second, they have specifically held subsequent related acts to be exhausted, even when they also amount to "discrete" acts of discrimination. *Wedow*, 442 F.3d at 673 (subsequent discrimination claims exhausted); *Lyons*, 307 F.3d at 1104–1105 (subsequent non-promotion exhausted); *Delisle*, 94 Fed. App'x at 254 (subsequent demotion exhausted). Just as the government's bold statement that there is no split defies the current legal landscape, its effort to

recharacterize the split in order to avoid review of this case is without merit.

3. Finally, the government claims that this Court's intervention is unwarranted as a practical matter, because "in those circuits that have addressed the question presented, plaintiffs may protect their interest by following the rule embraced by this Court in *Morgan*." Br. in Opp. 13. Such a position is naïve, at best.

Even to the informed plaintiff, it is not clear how or why *Morgan* applies to post-filing conduct. Several courts of appeals have expressly concluded that *Morgan* has *no relevance* to the question presented. *See, e.g.*, *Delisle*, 94 Fed. Appx. at 253 ("[Applying] the *Morgan* holding to the facts of this case is inapposite."); *Rivera v. Puerto Rico Aqueduct & Sewers Auth.*, 331 F.3d 183, 189 ("*Morgan* does not address whether a previously filed EEOC complaint must be amended to encompass subsequent discrete acts in order to render such acts susceptible to judicial review."). The government's insistence that *Morgan* is controlling—an opinion as to the proper *resolution* of the circuit split—does nothing to obviate the need for this Court to review the *conflict* between the government's position and contrary circuit court precedent.

But even if the government's claim that *Morgan* controls were correct, the brief in opposition disregards the fact that the bulk of Title VII claimants proceed before the EEOC without representation—much less representation that would

counsel them to disregard clear circuit precedent. Instead, these *pro se* claimants rely upon the EEOC to guide them through the process of filing an administrative charge. Yet the EEOC instructs plaintiffs that "[a] timely charge also may challenge incidents that occur *after* the charge is filed" and "*nothing* in *Morgan* suggests that a new charge must be filed when a charge challenging related acts already exists." EEOC COMPLIANCE MANUAL § 2-IV & n. 186 (emphasis added). It strikes at the very heart of Title VII for the government to first instruct claimants that they need not separately exhaust related claims during the administrative review process, only for the government to later disavow such guidance and argue that such claims should be dismissed from court.

Without this Court's intervention, an untenable status quo will continue unchecked: The circuit courts will remain divided on an issue of national importance, subjecting even diligent plaintiffs to the uneven administration of civil rights. The instant case offers a clear opportunity for the Court to address this longstanding confusion and provide would-be plaintiffs, the government, and the lower courts with the guidance they need.

CONCLUSION

For the reasons provided above and in the petition for writ of certiorari, this Court should grant the petition.

Respectfully submitted,

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